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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.
No. 606

RICHFIELD OIL CORPORATION,
Petitioner,

vs.

KARSEAL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR KARSEAL CORPORATION IN OPPOSITION.

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Opinions Below.

The District Court filed no Opinion. The Opinion of the Court of Appeals for the Ninth Circuit (Pet.-App. A.) is reported at 271 F. 2d 709.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

1. Does failure to distinctly state the matter objected to and the grounds, when making an objection to a jury instruction, result in a waiver thereof under Rule 51 of the Federal Rules of Civil Procedure?

2. Is a part of the instructions to the jury that was erroneous prejudicial, when there was left to the jury by the Court's entire instructions all of the proper elements of the case?

Statutes Involved.

For the purpose of these proceedings, respondent concedes that the statutes set forth in the Petition are correct.

Statement.

Respondent's complaint against petitioner was filed in the United States District Court on January 2, 1953. The action was for treble damages arising out of an alleged violation of the antitrust laws. The trial, subsequent to a successful appeal from a judgment dismissing the action, *Karseal Corporation v. Richfield Oil Corporation*, 221 F. 2d 358 (9th Cir. 1955), resulted in a jury verdict in favor of respondent in the sum of $7,900.00. Judgment in that amount, trebled, together with attorneys' fees and costs was entered February 1, 1957. [R. 115-117.]

Judgment was affirmed by the Court of Appeals for the Ninth Circuit by its Opinion dated October 13, 1959. (Pet. App. A).

Respondent alleged, and the jury found, that petitioner illegally restrained the sale of respondent's product "Wax Seal," an automobile polish, and that as a result respondent suffered damage. In the trial respondent properly used a prior decree resulting from the Government's Civil Antitrust action against the petitioner (*United States v. Richfield Oil Corporation* (S. D. Cal. 1951), 99 Fed. Supp. 280, affirmed *per curiam* (1952), 343 U. S. 922, 72 S. Ct. 665, 96 L. Ed. 1334). This prior decree was admitted in evidence. [R. 19-27; 129.] It is to be noted that respondent's product "Wax Seal" was not specifically mentioned in the decree or the findings but came within the general definition of "automobile accessories," which specifically included waxes and polishes.

In order to prevail at the trial it was necessary for respondent to prove, (1) that the illegal procedures found in the government case against petitioner were used against respondent and its product, or stated another way, that the respondent was in the "target area," (2) that respondent was damaged, and (3) the extent and amount of such damage. The government decree was not and could not have been used to prove that petitioner's illegal conduct was applied against respondent's product "Wax Seal." Respondent was properly required to prove that the restraint was applied to Wax Seal as such, and the jury so found. Petitioner raises no objections herein concerning the sufficiency of the evidence.

At the conclusion of the trial, the trial court gave both counsel ample opportunity to discuss the proposed instructions to the jury. [R. 1228-1243.] The court indicated that it would give counsel ample time to make objections to its instructions. [R. 1240, 1242.] Following the giving of the instructions to the jury [R. 1243-1268], the Court requested that counsel state any objections to the instructions. Respondent had none and so informed the Court. [R. 1268.] Counsel for petitioner indicated that the only objection it had to the instructions were with respect to "the fact of *prima facie*" and an instruction using the words "gross profits." [R. 1269.] Following the correction of the instructions concerning "gross profits," counsel for petitioner reiterated his objection pertaining to the giving of the instruction on "*prima facie*" with the stated purpose to "clear up this objection." [R. 1274.] The record is barren of any reference to the grounds for petitioner's objection to the instruction given to the jury, and its objection to the court refusing to give its instruction on this matter. It is acknowledged that prior to this time there was conversa-

tion between court and counsel concerning the effect of the earlier government decree against Richfield on the case at hand, but at no time did the conversation refer to or consider the proposed instructions to the jury. [R. 406-422.] The Court indicated during this colloquy that it was not making a ruling on the use of the decree. [R. 422.]

The Court of Appeals for the Ninth Circuit upon affirming the verdict of the jury held that the instruction, while erroneous, was not prejudicial. This holding by the court below followed a discussion of the sufficiency of petitioner's objection to the instruction in question under the requirements of Rule 51 of the Federal Rules of Civil Procedure. The court below found that petitioner's objection to the instruction given and the court's refusal to give its instruction had been waived by failure to state the ground for the objection at the time it was made. There can be no doubt that petitioner wholly failed to state the grounds for its objection to the instruction, [R. 1273-1274] and petitioner does not deny this. Notwithstanding a finding by the court below that the objection made by petitioner was faulty, the court went on fully to discuss the effect of the instruction, as if the objection had been properly made. The question raised by petitioner concerning the disputed instruction is fully covered by the opinion below. (Pet. App. A. 25-37.)

Reasons the Petition for Writ of Certiorari Should Be Denied.

The decision of the Court of Appeals raises no special or important questions. The decision is not in conflict with the deicisions of the other Courts of Appeal on the same matter. The decision below was clearly correct.

ARGUMENT.

I.

Failure to Comply With Rule 51 of the Federal Rules of Civil Procedure Is Not Excused by Prior Colloquy Between Court and Counsel on a Question of Law Unrelated to Instructions to the Jury.

Rule 51 of the Federal Rules of Civil Procedure specifically requires that a party objecting to the giving or the failure to give an instruction to the jury state "distinctly the matter to which he objects and the grounds of his objection." Petitioner seeks to mitigate the effect of Rule 51 by citing numerous cases and text material for the proposition that their objections to the questioned instruction and the court's failure to give its instruction need not have been restated in view of the fact that its position on these matters was known by the court. It is significant that the opinion of the court below states, and the record so indicates, that "the *court's* position was well known to Richfield's counsel." (Pet. App. A 24; emphasis added). The prior colloquy between court and counsel referred to in the petition was little more than a statement by the court of its position on the meaning of the words "*prima facie*" in Section 5 of the Clayton Act, 15 U. S. C. A. 16 (a). Throughout this discussion petitioner indicated that it disagreed with the trial court, and the trial court indicated that it would not rule on the matter at that time. [R. 409.] Petitioner's counsel indicated some doubt as to his position, [R. 415], and the colloquy referred to ended inconclusively, in that the court did not specifically rule on the matter and the petitioner did not *distinctly* state the grounds for its objection to the court's position, even at that time. This colloquy occurred early in the trial and was not raised again until both sides had rested and the proposed

instructions to the jury considered. Petitioner was aware that the court did not agree with its position and the court was aware that petitioner did not agree with the court's position in the matter, but the grounds for petitioner's position were never stated distinctly or otherwise. [R. 1273-1274.] Petitioner attempted to "clear up this objection" but did little more than restate the general objection theretofore made. [R. 1274.]

The objection must be sufficiently specific to bring into focus the precise nature of the alleged error. A general objection presents nothing for review. 2 Barron and Holtzoff, Federal Practice and Procedure Section 1104; *Husky Refining Co. v. Barnes,* 119 F. 2d 715 (9th Cir. 1941); *Flint v. Youngstown Sheet and Tube Co.,* 143 F. 2d 923 (2d Cir. 1944).

Petitioner observes that the holding below on waiver is not as important as other cases considered by this Court. (Pet. 11.) This is particularly true in view of the fact that the opinion below is consistent with Rule 51 and not at all inconsistent with the opinions of other circuits. Petitioner would appear to mistake the court's awareness that an objection would be made to a particular point, for awareness of the *grounds* of the objection. There is a vast difference between the two and the court below correctly recognized the difference. (Pet.-App. A. 24-26.)

Johnson v. Chesapeake & Ohio Ry. Co., 227 F. 2d 858 (7th Cir. 1955);

Solario v. Atchison, Topeka & Santa Fe Ry. Co. 224 F. 2d 544 (10th Cir. 1955);

Trowbridge v. Abrasive Co. of Philadelphia, 190 F. 2d 825 (3rd Cir. 1951).

The holding below presents no special or important questions and presents no substantial conflict with Court of Appeals' decisions from other circuits. The opinion of the Court of Appeals concerning Rule 51 in no way altered the court's decision, since the court fully considered the points raised by petitioner as if petitioner had properly stated its grounds in its objection to the instruction given and the court's failure to give its instruction.

II.

Error Which Could Not Change the Result of the Trial Is Harmless.

The critical consideration is the seriousness of the error, not its occurrence. Appellate Courts will not disturb a judgement if, on an examination of the entire record, it appears that substantial justice has been done and the petitioner has suffered no prejudice. Errors in instructions to the jury are harmless where the matters complained of could not have influenced the verdict of the jury. *United Press v. Charles*, 245 F. 2d 21 (9th Cir. 1957); Cert. Denied (1957), 354 U. S. 925. The court below considered the question of whether the trial court's instruction to the jury concerning the applicability of the government decree was in error, even though it found that petitioner's objection to the instruction was insufficient. The court below, after considering the entire record and the trial court's full charge to the jury, held that petitioner was not prejudiced. This conclusion is inescapable when reading the court's entire instruction to the jury.

Agreeing for this discussion, as the Court of Appeals found, that that portion of the trial court's instruction pertaining to the government decree was erroneous, we find that in fact the government decree in the case at

hand had little or no effect on the conduct of the trial. Petitioner does not, and cannot, contend that admissibility of the decree in evidence was error.

To consider the effect of the court's instruction to the jury concerning the decree, [R. 1243-1268], we must consider the use of the decree at the trial. As has heretofore been pointed out, the decree did not specifically hold that the illegal procedures followed by petitioner were used against respondent's product "Wax Seal." It would have been an idle act on the part of the respondent to merely prove that petitioner restrain trade in waxes and polishes in general, which is what the decree established, since the primary issue to be proved by respondent was that its specific product, Wax Seal, was subject to this unlawful restraint. The decree in no way aided respondent in this proof. Substantial evidence was introduced by respondent to prove that its specific product was in the "target area" of the restraint and petitioner was freely permitted to rebutt this evidence. There is no contention here that the evidence was insufficient nor that petitioner was prohibited from rebutting that evidence. It might be noted that petitioner did introduce evidence that it did not restrain trade in waxes and polishes in general, without objection. Its Manager of Retail Sales and T.B.A., George R. Miller, so testified. [R. 1059.] In addition, the vast majority of service station operators called by petitioner to testify that they bought "Wax Seal," testified at length as to purchases of other unapproved waxes and polishes. Therefore, while the trial court took the position that it would not permit petitioner to "go behind the decree," petitioner did so on innumerable occasions without objection from respondent or the trial court. As the trial developed, the decree was of minor significance and had little or no effect on the overall result.

The trial court required respondent to prove, (1) that the illegal procedures of petitioner were applied to respondent and its product, (2) that petitioner was damaged as a result, and (3) the extent and amount of such damage. These three elements constitute all the proper elements of a so-called "treble damage case." The court so instructed the jury. [R. 1254, 1257, 1259, 1265; Pet. App. A 34-37.]

The party seeking to have a judgment or verdict set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. *Palmer v. Hoffman*, 318 U. S. 109. Petitioner wholly fails to sustain this burden. It is powerless to demonstrate in the record or in its petition that the error found by the Court of Appeals was prejudicial. Harmless error does not lay any substantial basis for disturbing the judgment on appeal. *Employers Liability Assurance Corp. v. Freeman*, 229 Fed 547 (10th Cir. 1955).

The case cited by petitioner in support of its argument concerning the instruction is not applicable to the case at hand. *Bihn v. United States*, 328 U. S. 633 was an appeal from a conviction of perjury upon the testimony of only one corroborating witness. The trial court refused to grant appellant's requested instruction to the jury that as a general rule the testimony of one corroborating witness is insufficient to establish falsity of testimony. The error involved therein was the complete omission of a proper instruction the effect of which, if given, would have been to direct an acquittal of the accused. This Court in reversing held that the missing charge was so important to the vital issue in the case that the error was prejudicial. Petitioner has failed to establish that that part of the instruction in question was important to a vital issue in the case, or even important at all.

The Court of Appeals properly found that the trial court's full instructions to the jury properly stated the law as applied to the case at hand. The jury was fully instructed and no possibility of confusion existed.

Conclusion.

The questions which petitioner asks this court to review are of little importance to anyone save petitioner. The Court of Appeals found a technical error committed by petitioner, but still gave complete consideration to the question raised by petitioner's Brief to the Court of Appeals. The opinion of the court below was based on the merits and that decision is not in conflict with decisions of Court of Appeals of any other Circuit or this Court and petitioner fails to present any special, unique or important questions.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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